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No. 00-1592

IN THE
Supreme Court of the United States

BALTIMORE SCRAP CORPORATION,
Petitioner,

v.

THE DAVID J. JOSEPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly ruled that, if a fraud exception to *Noerr-Pennington* exists, it does not apply to nonmaterial misrepresentations that do not deprive the litigation of its legitimacy.

2. Whether the Fourth Circuit correctly ruled that *Noerr-Pennington* immunity attaches to non-parties that could have but chose not to litigate in their own name, but instead to fund litigation by third parties that is not objectively baseless.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Baltimore Scrap Corp. was the appellant and plaintiff below.

Respondents and defendants below and respondents in this Court are The David J. Joseph Company, t/a United Iron & Metal Company; David J. Workum, III; I.D. Shapiro; James Shapiro; Charles Baum; United Holdings Co. Inc.; United Operating Co. Inc.; and United Investment Enterprises Partnership. The David J. Joseph Company is controlled by parent corporations SHV North America Corporation, SHV Nederland BV, SHV Holdings N.V., and Stichting Administrative Kantoor Lauwerecht. The remaining respondent corporations, United Holdings Company, Inc., United Operating Co., Inc., and United Investment Enterprises Partnership, have no parent corporations, and no publicly held company owns 10% or more of their stock.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, The David J. Joseph Company, t/a United Iron & Metal Company; David J. Workum, III; I.D. Shapiro; James Shapiro; Charles Baum; United Holdings Co. Inc.; United Operating Co. Inc.; and United Investment Enterprises Partnership, hereby oppose the petition for a writ of certiorari filed by the Baltimore Scrap Corp.

STATEMENT OF THE CASE

1. This case arises out of an antitrust suit brought by petitioner Baltimore Scrap Corp. against respondents for their opposition to petitioner's application to erect a scrap metal shredder in Baltimore City. Respondents are all past and current owners, operators, and parties with some financial interest in an existing scrap metal shredder in Baltimore that faced competition from petitioner's shredder. Pet. App. 25a-26a. Before petitioner could install its shredder, it was required to secure the approval of the Baltimore Board of Municipal and Zoning Appeals (the "Board"), which reviews

zoning applications for such projects. Petitioner filed an application with the Board in September 1991. At its hearing on November 19, 1991, the Board received evidence from a variety of sources, including representatives of citizens groups and elected city officials who testified against petitioner's application. *Id.* at 28a-29a. On November 25, 1991, the Board denied the application. *Id.* at 29a. The Circuit Court for Baltimore City affirmed the Board decision. *Id.* at 5a. Respondents had no contact with Board members, no contact with the citizens groups, did not participate in the hearing or the appeal, and played no role in the denial of petitioner's application. See *id.* at 27a-29a.

In May of 1992, petitioner submitted a second application to the Board that responded to certain environmental issues about which the Board previously had expressed concerns. Petitioner claimed that its new application was "substantially different" than the first one.[1] The Board heard evidence in this second review from many of the same citizens groups that had opposed the 1991 application as well as new arguments from petitioner concerning environmental safeguards. Pet. App. 29a. On August 6, 1992, the Board voted to approve the new application. *Id.* However, in issuing its decision, the Board erroneously categorized the approved shredder as a "material recovery facility" or an "MIRF." *Id.* This classification was unquestionably in error because an MIRF must be contained in an enclosed facility and is not authorized to accept certain ferrous metal. Petitioner's shredder was not enclosed and petitioner proposed to accept ferrous metals. *Id.* at 29a-30a.

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[1] An applicant that is rejected by the Board normally must wait one year before submitting a second application unless the applicant can show that the second application was "substantially different" than the first. The Board found that petitioner successfully met this standard. Pet. App. 29a.

2. While, as the district court noted, some respondents had standing as taxpayers to appeal this decision to the Circuit Court for Baltimore City, they instead took steps to assist in the representation and funding of more sympathetic citizens groups to pursue an appeal. Pet. App. 30a. In so doing, respondents provided financial and legal support for the appeal effort without affirmatively disclosing to the citizens groups or to the Court itself respondents' involvement. The citizens groups raised three legal issues with the Circuit Court, one concerning the Board's finding that petitioner's second application was "substantially different" than its first and two issues addressing the problems with the shredder's designation as an MIRF. *Id.* at 31a. As the district court concluded, the claims raised by this suit were neither objectively baseless nor fraudulent. The appeal addressed what the district court described as "bona fide legal issues" including the standing of the citizens groups and whether the Board had used the appropriate legal standard in approving the application. *Id.* at 21a. Likewise, the Fourth Circuit found that "an objective litigant could reasonably expect to achieve success on the merits." *Id.* at 10a.

Petitioner moved to dismiss the citizens groups' appeal. Petitioner argued that the citizens groups lacked standing to appeal. In response, a member of one of the groups, Gloria Sipes, moved to intervene, and petitioner opposed that motion as untimely. Pet. App. 31a. This case was initially assigned to Associate Circuit Judge Ward. He granted Sipes' motion to intervene and denied the motion to dismiss the citizens groups' for lack of standing. *Id.* at 31a-32a. The case was then assigned to Circuit Court Chief Judge I. H. Hammerman to be heard on the merits. The Chief Judge expressed agreement with Judge Ward's rulings on intervention and standing. *Id.* at 32a.

Judge Hammerman initially found merit to the citizens groups' argument that the facility was plainly not an MIRF

and therefore could not be approved as such.[2] Accordingly, the matter was remanded to the Board for reconsideration. Pet. App. 32a. In petitioning Judge Hammerman to reconsider the remand to the Board, petitioner submitted an affidavit from the Board's Chairman claiming that the references to an "MIRF" were inadvertent and that the Board meant to approve the application on other grounds. *Id.* at 34a. The court accepted this remarkable amendment to the agency's formal decision. Accordingly, based on this new evidence, Judge Hammerman affirmed the Board's decision. *Id.* at 35a.

3. The citizens groups moved to stay enforcement of Judge Hammerman's decision pending an appeal to the Maryland Court of Special Appeals. During this time, an "errant fax" revealed the involvement of respondents in supporting the appeal effort behind the citizens groups. Pet. App. 36a. Petitioner drew attention to this issue in opposing the motion to stay enforcement. Judge Hammerman denied the motion to stay and, in his opinion, recognized respondents' "role as an active participant" in the legal effort to oppose petitioner's application. *Id.* at 38a. Notwithstanding this disclosure, the citizens groups and Gloria Sipes pressed their appeal to the Maryland Court of Special Appeals with respondents' support.[3] That court in a lengthy opinion ultimately con-

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[2] While denying the citizens groups' argument that the second application was not substantially different than the first, Judge Hammerman's comments indicated that that ground for appeal also raised serious issues. Pet. App. 32a.

[3] Petitioner implies that, had Ms. Sipes known about the source of the litigation's support, the appeal would not have gone forward. Pet. 7. In fact, she did pursue the appeal for many months after the respondents' support was fully revealed. Furthermore, as the district court points out, it is unclear from Ms. Sipes' statements whether she still would have pursued the appeal even with knowledge of respondents' aid. Moreover, Ms. Sipes was not the only appellant and, as the district court found, the appeal would likely have gone forward without Ms. Sipes. Pet. App. 51a

cluded that the citizens groups lacked standing to challenge the Board's zoning decision and that Sipes' intervention was not timely. The Court made a "logical extension" of analogous federal and state law to disallow Sipes' claim to relate back to the time when the groups timely filed their appeal. *Sipes* v. *Board of Mun. & Zoning Appeals*, 635 A.2d 86, 95-99 (Md. Ct. Spec. App. 1994). Petitioner constructed its shredder during the appeals and began operating the shredder in July 1993.

4. Petitioner filed this lawsuit in the United States District Court for the District of Maryland. Petitioner alleged that respondents' activities in opposing the construction of the shredder which petitioner claims was delayed by approximately 18 months, constituted a violation of Section 1 of the Sherman Act. 15 U.S.C. § 1;[4] Pet. App. 21a. The district court found that respondents' activities qualified for immunity under the *Noerr-Pennington* doctrine[5] that protects a party that petitions the government for redress, even if that party may have anticompetitive motivations for its actions. *Id.* at 41a. The district court further found that Respondents' conduct did not fall within any exception to the doctrine.[6] First, the court concluded that the appeal of the Board's

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n.36. Indeed, in the Fourth Circuit's view, respondents' actions toward the citizens groups "fails to rise to the level of fraud among the parties" and "falls far short of showing the type of fraud upon the court that would deprive the litigation of its legitimacy." *Id.* at 16a.

[4] Petitioner also alleged six state law tort counts in its complaint. Pet. App. 39a. They were dismissed by the district court based upon *Noerr-Pennington*. *Id.* at 56a-57a.

[5] The *Noerr-Pennington* doctrine derives its name from *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), that jointly set out the doctrine described in the text.

[6] With the parties' concurrence, the district court bifurcated discovery limiting initial discovery to whether the *Noerr-Pennington* exceptions apply.

decision with respondents' assistance was not a "sham" because the legal issues raised were not objectively baseless. *Id.* at 47a. Second, any misrepresentations by respondents regarding their backing of the citizens suits did not invoke any putative "fraud exception" to *Noerr-Pennington* because the alleged fraud was not the type of "deceptive conduct which goes to the core of a lawsuit's legitimacy."[7] *Id.* at 49a. The district court consequently granted summary judgment in favor of the respondents on all counts. *Id.* at 57a.

5. The Fourth Circuit unanimously affirmed, holding that respondents' actions were protected by the *Noerr-Pennington* antitrust immunity. The court of appeals ruled that the appeal was not a sham as "an objective litigant could reasonably expect to have success on the merits." Pet. App. 11a. In addition, the court found no merit to petitioner's claim (raised for the first time on appeal) that *Noerr-Pennington* immunity is inapplicable to non-parties to the litigation. *Id.* at 11a-13a. Finally, the Fourth Circuit affirmed the district court's view that, if a fraud exception to *Noerr-Pennington* exists, it does not apply to a case like this where none of defendants' alleged frauds "infect[ed] the core of the litigation's legitimacy." *Id.* at 17a.

REASONS FOR DENYING THE PETITION

1. Petitioner raises two questions in its petition, neither of which presents a remotely legitimate conflict or question of national import that would warrant resolution by this Court. Petitioner first urges (Pet. 13) the Court to grant review to decide an issue that is manifestly not presented in this case – whether a fraud exception exists under *Noerr-Pennington*.

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[7] Indeed, the only alleged misrepresentations to the court (Irwin's statements concerning respondents' support) were not made in a hearing on the merits, but in a hearing on the motion to stay, which motion petitioner won, and at which hearing Judge Hammerman recognized respondents' "role as an active participant." See Pet. 37a-38a.

The court of appeals assumed that such an exception was available and then held that petitioner's charges, in any event, were insufficient to demonstrate the kind of fraud that would justify stripping respondents' actions of immunity from the antitrust laws. Thus, to the extent there is a conflict in the circuits on this issue, which there is not, petitioner has no basis to complain because it received the benefit of the most favorable rule available and its claims still were not sufficient. At the end of the day, the primary issue that petitioner poses is simply not presented by the holding below.

What is presented by the holding of the Fourth Circuit is a straightforward application of a fraud exception as that concept was hypothesized by this Court in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61-62 n.6 (1993) ("*PRE*"). This Court emphasized that, even if an exception exists, the "reprehensible practice" must be such as to "corrupt the administrative or judicial processes" before any argument could be persuasively offered to strip a defendant of *Noerr-Pennington* immunity. *Id.* That is exactly the standard used by the courts below in holding that any misconduct was still protected from Sherman Act scrutiny. Pet. App. 14a.

Nor was this Court's focus on corrupting the process of only passing interest. This is precisely the legal standard that flows from the Court's earlier decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965), where a fraud on the patent office was central to the issuance of a patent and thereby vitiated the administrative process. Certainly, nothing in *PRE* or *Walker Process* invites federal courts to use the Sherman Act to police litigant conduct that does not affect the litigation process, much less deprive that process of all "legitimacy."

There is no merit to petitioner's assertion (Pet. 3) that the lower courts are in disarray concerning the proper approach to dealing with a fraud exception in the wake of *PRE*. Petitioner concedes that the holding of the Fourth Circuit is squarely

consistent with decisions of the Third and Ninth Circuits. Those courts expressly have focused on whether the actions of the defendant "infect the core of [the] case." Pet. App. 14a (internal quotation marks omitted); *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 123-24 (3d Cir. 1999);[8] *Liberty Lake Inv., Inc.* v. *Magnuson*, 12 F.3d 155, 157-59 (9th Cir. 1993); *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998). Here, of course, both courts below concluded that any misconduct by respondents was completely immaterial to the litigation. That determination plainly does not warrant further review by this Court.

The cases cited by petitioner from other circuits simply do not conflict with the Fourth Circuit's position regarding a materiality requirement in the application of a fraud exception to *Noerr-Pennington*. In the first place, most of the decisions pre-date *PRE* and thus do not have the benefit of this Court's most relevant observations on the issue. See *Woods Exploration & Producing Co.* v. *Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971); *St. Joseph's Hosp. Inc.* v. *Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986); Pet. 17-18. How those courts will respond to that reasoning and whether

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[8] Petitioner's focus on the confusion in the Third Circuit demonstrates most plainly why review in this case is not warranted. Whether this Court were to adopt the rule in *Cheminor* or in *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3d Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000), petitioner's lawsuit would be dismissed. Thus, the decisional problems that the Third Circuit arguably needs to resolve are purely of academic interest to petitioner. Similarly, petitioner's focus on the brief of the Solicitor General in *Armstrong* is completely misplaced. In that case, the Third Circuit refused to recognize a fraud exception to *Noerr-Pennington* in circumstances of a direct challenge to the decision of a state regulatory body. That ruling, of course, is of no benefit to petitioner. Nonetheless, the United States urged the Court not to grant that petition and this Court followed that recommendation. U.S. Br. at 20. It follows, *a fortiori*, that the Court should not review the decision here in which the court of appeals entertained such an exception, but found petitioner's arguments inadequate.

there is a real difference in opinion when the issue is squarely posed for those courts is a matter of conjecture and provides no basis for action by the Court now.

Moreover, all that the cases cited by petitioners hold is that a fraud exception to *Noerr-Pennington* may be available in the context of a material misrepresentation. They do not address, much less conflict, with the reasoning of the Fourth Circuit that the alleged fraud must be such as to deprive the underlying judicial process of its "legitimacy." Indeed, in all of those cases, the fraudulent submission played a central role in the government proceeding and fundamentally threatened the legitimacy of the process.[9] The Fourth Circuit principle that only material misrepresentations that infect the core of the judicial process are not entitled to antitrust immunity, is consistent with, not in conflict with, the principles that underlie the cases from other circuits. Simply characterizing these cases as recognizing a "freestanding" fraud exception (as opposed to application of a fraud exception in conjunction with the *PRE* sham test) does not create a circuit conflict, particularly when the underlying principles are compatible. And, at no point do petitioners cite to a case upholding the rule that they seek here, *i.e.*, that any fraud or misrepresentation that has *no* material impact on the underlying adjudication causes the loss of *Noerr-Pennington* immunity.

Petitioner also attempts to contrast the Fourth Circuit's holding with two cases that petitioner asserts "consider[] claims of fraud under the general test for sham litigation." Pet. 19. Again, these cases were decided prior to this Court's decision in *PRE*, and thus make petitioner's distinction largely irrelevant. See *Landmarks Holding Corp.* v. *Bermant*,

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[9] *See, e.g.*, *Whelan* v. *Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (finding that "[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions *based on* known falsehoods" and citing to *Liberty Lake*'s requirement that a fraud deprive a litigation of its legitimacy) (emphasis added).

664 F.2d 891, 892-97 (2nd Cir 1981); *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568 (6th Cir. 1986). Any sham analysis formulated before this Court set out the parameters of the sham exception and identified its potential distinction with a separate fraud exception is subject to clarification. Moreover, the mere fact that the courts in both of these opinions cited to language in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), opining on how "unethical conduct" in the adjudicatory process should be unprotected by *Noerr-Pennington* immunity hardly demonstrates a conflict with the Fourth Circuit's decision here.

Further, the reasoning used in these cases again does not conflict with the analysis of the Fourth Circuit. In *Landmark*, the defendant pursued litigation regardless of merit, using multiple tactics of delay, which included filing numerous appeals and supporting other frivolous lawsuits, all in hopes of using the administrative process to delay and discourage a competitor. *Landmarks Holding Corp.*, 664 F.2d at 892-97. This case clearly fits under the past and present sham exception – objectively baseless, subjectively ill-motivated, and displaying a pattern of repetitive meritless claims – thus negating any need for a court even to address issues of fraud. *Id.* at 896. Similarly, in *Potters Medical Center*, the court applied the sham test and found that defendant's conduct did not consist of "baseless, repetitive claims" or "an abuse of process" to threaten defendant's antitrust immunity. *Potters Med. Ctr.*, 800 F.2d at 579. Neither of these holdings conflicts with the principle espoused in *Baltimore Scrap* that a fraudulent act must be material to warrant exclusion from *Noerr-Pennington* immunity. The fraudulent activity alleged in this case does not come close to fitting within any iteration of a fraud exception to the *Noerr-Pennington* doctrine as iterated by any of the circuits. Accordingly, this case does not warrant further review.

2. Petitioner poses (Pet. 23-26) a second question for review, *viz.*, whether a third party that lacks standing on its own to bring litigation retains the protection of *Noerr-Pennington* immunity when funding another party in the litigation. Petitioner relies on *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), a Fifth Circuit case decided prior to *PRE*, as the primary source of circuit disagreement over this issue. *Burlington Northern* affirmatively held that *Noerr-Pennington* does not apply to a third party providing funding to a party in a lawsuit in which it has no standing. *Id.* at 530.

In the first place, the respondents actually did have independent standing to appeal the Board's decision. The district court, which is in the best position to understand Maryland law, in relating the factual background of this case, observed that as taxpayers "[t]he defendants had standing to appeal the BMZA's decision to the Circuit Court for Baltimore City," but for strategic reasons, decided instead to back a citizens group appeal.[10] Pet. App. 20a. Thus, this case does not even present the question urged by petitioner. Second, *Burlington Northern* not only pre-dated *PRE*, but this Court "specifically disapproved of *Burlington Northern*" in its *PRE* opinion. 508 U.S. at 55 n.3; Pet. App. 12a. Moreover, the Fourth Circuit's holding that *Noerr-Pennington* is not so restrictive as to protect only the actual litigants from antitrust liability without also covering third parties backing a suit lines up directly behind the rule of the Ninth and Sixth Circuits. See Pet. App. 11a (citing *Liberty*

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[10] Based upon the Baltimore City ordinances as interpreted throughout the 1990s, both petitioner in this appeal, petitioner's attorney in the zoning proceeding, and the Maryland Court of Special Appeals concurred that taxpayers had standing to appeal the BMZA decision. *See Sipes v. Board of Mun. & Zoning Appeals*, 635 A.2d 86, 91-92 (Md. Ct. Spec. App. 1994) (pointing out the lack of dispute over an individual taxpayer's standing to appeal the Board's decision). Petitioner's citation to the Maryland Court of Special Appeals' decision in 2001 has no relevance to respondents' standing in 1992. Pet. 23 n.10.

Lake, 12 F.3d, at 157-59; *Opdyke Inv. Co.* v. *City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989)).[11] Petitioner attempts to portray *Liberty Lake* as being in conflict with the holding here. Pet. at 25. In fact, the application of *PRE* in *Liberty Lake* fully supports the Fourth Circuit's position that, as long as a suit has objective merit and potential fraud does not deprive the litigation of its legitimacy, then the supporters of the suit receive immunity under the "sham" test regardless of their standing. *Liberty Lake*, 12 F.3d at 158-59. Given the doubt cast upon *Burlington Northern* by this Court and the consistent holdings of the other circuits, it is doubtful whether the Fifth Circuit would retain its aberrational approach to this issue. If it does, then this Court can review the issue at that time.

3. Finally, petitioner's argument that the questions raised by this case are of such national import as to merit certiorari is at best an exaggeration. While abuse of the adjudicatory process is of course a serious concern, it is one that has hardly been ignored by this and the other circuit courts. Rather, the court of appeals' opinions in this area reflect careful and appropriate attention to petitioner's concerns. The developing

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[11] Numerous other decisions, not cited by the Fourth Circuit, extend *Noerr-Pennington* to those supporting litigation. *E.g. AroChem Int'l, Inc.* v. *Buirkle*, 968 F.2d 266, 272 (2d Cir. 1992) ("It is not independently tortious to finance another's litigation."); *Federal Prescription Serv., Inc.* v. *American Pharm. Ass'n*, 663 F.2d 253, 268 (D.C. Cir. 1981) (defendents "cannot be held liable . . . for . . . financing lawsuits"); *South Dakota* v. *Kansas City S. Indus.*, 880 F.2d 40, 53 (8th Cir. 1989) (assuming defendant was not a formal party but assisted others, its participation "did not . . . constitute 'sham' petition"); *Garst* v. *Stoco, Inc.*, 604 F. Supp. 326 (E.D. Ark. 1985); *Wilmorite, Inc.* v. *Eagan Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977) (developers who organized and financed property owners to oppose a competing development enjoy *Noerr-Pennington* immunity), *aff'd*, 578 F.2d 1372 (2d Cir. 1978); *Pacific Gas & Elec. Co.* v. *Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990). None of these cases requires that the party supporting the litigation must have standing in its own right to have *Noerr-Pennington* protection.

precedent in this area continues a prudent balance between preserving the First Amendment right to petition the government and punishing fraudulent activity that corrupts the core of a proceeding's legitimacy, while also respecting federalism concerns by not burdening state actors with federal judicial review through antitrust litigation. "Liability for injuries caused by . . . wrongful . . . conduct [by private parties] . . . . rests with laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs." *Armstrong Surgical*, 185 F.3d at 162.

Petitioner claims that Respondents' "covert funding and direction of litigation" somehow "threatens to corrupt" the *Noerr-Pennington* doctrine and "undermine the sham exception to *Noerr*." Pet. 26. But in reality, as the Fourth Circuit points out in this case, "non-parties often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support." Pet App. 13a. In fact, such support often enables parties in interest to pursue legitimate litigation when they lack financial or legal resources to do so.[12] *Id.* The rights and benefits associated with providing such aid is not negated by the anticompetitive motivations of the supporter or their interest in remaining secret. *Id.*

Further, truly fraudulent or otherwise improper activity in the adjudicatory process is already more appropriately remedied through other safeguards including state laws regulating misbehavior in the court room. See Pet. App. 17a. Antitrust laws are not a suitable mechanism for regulating improper conduct, particularly for conduct that is not material to the legal process at issue. The Sherman Act is a heavy-handed way to police such conduct in light of the serious federalism concerns involved in frequent federal court review of state government proceedings. See *id.* at 8a-9a.

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[12] Petitioner even points out in its brief that the citizens groups in this case lacked the funding to pursue this appeal without respondents' support. Pet. 7.

While of course "[m]isrepresentations and fraud are dangerous to the adjudicative process," petitioner is wrong in arguing that the holding below permits litigants to make false representations to the court and win their case. Pet 27-29. These allegations do not apply here: 1) respondents did not prevail in their appeal of the Board's decision; 2) the challenges to the decision were not objectively baseless; and 3) the alleged misrepresentations were immaterial to the court's determination. This is precisely a case where *Noerr-Pennington* should apply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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